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No. 86-1506

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

HELEN K. DYKES,

Petitioner,

v.

NATIONAL GYPSUM COMPANY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a United States court of appeals, in a diversity case, holds that a Tennessee statute relating to contribution between tortfeasors applies to an award of punitive damages, does an allegation that the court misconstrued the state statute raise a serious claim that the court violated the right to due process or the right to a jury trial guaranteed by the Fifth and Seventh Amendments to the United States Constitution, or otherwise warrant the exercise by this Court of its discretionary power to issue a writ of certiorari?

LIST OF PARTIES AND RULE 28.1 LIST

Petitioner Helen K. Dykes and respondent National Gypsum Company were the only parties to the proceeding below.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent National Gypsum Company, a corporation, identifies the following parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates:

Parent Company:

AANCOR Holdings, Inc.

Subsidiaries:

Valley Office & Industrial Park, Inc.

Yeso Santa Rosolia, S.A.

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Respondent National Gypsum Company submits this brief in opposition to the petition for a writ of certiorari, which asks this Court to review a decision by the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit's decision, which was rendered in a diversity case, held that Tennessee's Uniform Contribution Among Tortfeasors Act, T.C.A. §29-11-101, *et seq*., allows contribution with respect to awards of punitive damages.

Petitioner's attempts to transmute the Court of Appeals' interpretation of the Tennessee statute into an alleged violation of the United States Constitution is both strained and disingenuous. As set forth at greater length below, this case presents simply a question arising under the law of Tennessee in an area which is not of substantial national concern.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 801 F.2d 810 and is included in petitioner's Appendix ("Pet. App.") at 1a, *et seq.*.

The Memorandum and Order of the United States District Court for the Eastern District of Tennessee, Northern Division (Porter, S.J.), which is unreported, is set forth at Pet. App. 23a, *et seq.*.

JURISDICTION

Petitioner, who was the plaintiff in the district court, brought this case in federal court on the basis of diversity of citizenship. 28 U.S.C. §1332. The matter is before this Court on petitioner's request for a writ of certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Contrary to the suggestions in the petition, the Fifth[1] and Seventh Amendments to the United States Constitution are wholly irrelevant to this case. In fact, the United States Constitution has no bearing whatsoever on this matter. The decision of the Court of Appeals involved only the interpretation of the Tennessee Uniform Contribution Among Tortfeasors Act (the "Tennessee Act").

The full text of the Tennessee Act appears in the Appendix to the petition at 50a-52a. As relevant here, the Act provides that:

> "29-11-105. Effect of release or covenant not to sue upon liability of other tort-feasors. — (a) when a release . . . is given in good faith to one (1) or two (2) or more persons liable in tort for the same injury or the same wrongful death: (1) It . . . reduces the claim against the other [tort-feasors]

1. Petitioner is alleging that the Court of Appeals itself, rather than the Tennessee legislature, violated the United States Constitution. Thus, the Fourteenth Amendment has no bearing here.

> to the extent of any amount stipulated by the release . . ., or in the amount of a consideration paid for it, whichever is the greater . . ."

The Tennessee Act also provides that contribution is not available for the benefit of any tort-feasor who has acted "intentionally." Pet. App. at 51a.

STATEMENT OF THE CASE

This action was originally brought in the United States District Court for the Eastern District of Tennessee by Eulis S. Dykes and his wife, petitioner Helen K. Dykes, against respondent and fifteen other defendants. Mr. Dykes sought damages from all defendants for mesothelioma which he had contracted, allegedly as the result of exposure to the asbestos products of the defendant companies. The complaint alleged that all defendants, including but not limited to respondent, were liable for punitive as well as compensatory damages.[2]

The case was tried before a jury from January 13 to January 31, 1984. Before the trial ended all of the defendants except respondent settled with petitioner in amounts totalling $503,725. The settlement agreements released the settling defendants from all claims, whether for compensatory or punitive damages.

On February 1, 1984, the jury returned a general verdict against respondent, awarding compensatory damages of $300,000 and punitive damages of $200,000. After the verdict was rendered, respondent moved the District Court to reduce the jury verdict in accordance with the requirements of the Tennessee Act concerning contribution between tortfeasors. The District Court denied in part respondent's motion insofar as it sought reduction of punitive damages. The Court stated that:

> "There was no allegation, much less finding, in this case that the defendant was guilty of an intentional tort. Therefore, contribution is mandated by Tenn. Code Ann.

2. Mr. Dykes died before trial and petitioner Helen K. Dykes was substituted for him in his capacity as a plaintiff herein.

> §29-11-105[a](1) as to that portion of the jury's award to plaintiff which represents the joint and several liability of all original defendants herein."

Pet. App. at 36a. However, the Court concluded that "awards of punitive damages are simply outside the purview of the Tennessee statute [on contribution between tortfeasors]," and declined to reduce the punitive damages awarded by the jury against respondent. Pet. App. at 36a-37a (footnote omitted). Thus, it is clear that the District Court's decision rested on its conclusion that, as a matter of law, the Tennessee Act never requires contribution with respect to awards of punitive damages.

The Court of Appeals reversed, based on its reading of the language and the legislative history of the Tennessee Act.[3] The Court noted that when the Tennessee legislature addressed the issue of contribution between tortfeasors, it revised the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 (1955) (the "Uniform Act") in a manner which establishes that the Tennessee Act was expressly intended to allow contribution unless the defendant has acted "intentionally."[4] The Court of Appeals noted that punitive damages can be awarded under Tennessee law even if the defendant has not acted "intentionally," as long as the defendant has engaged in "willful" conduct. Here, as the District Court found, petitioner had never even alleged that any of the defendants had acted "intentionally." Since the Tennessee legislature had specifically decided to allow contribution in cases of willful or wanton (but not intentional) conduct, the Court of Appeals reversed District Court's decision.

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3. The Court affirmed the District Court on a number of other issues raised by National Gypsum which are not relevant to the petition herein.

4. Specifically, the Tennessee Legislature amended Section 1(c) of the proposed Uniform Act, which provides that "there is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury or wrongful death," deleting the provisions that contribution is unavailable to tortfeasors who have acted "willfully or wantonly." 12 U.L.A. 63 (brackets in the original).

Following the decision by the Court of Appeals, Petitioner Dykes sought a rehearing on the issue of the set-off against punitive damages, arguing that the Court had misapplied Tennessee law. The petition for rehearing suggested for the first time that petitioner's rights to due process under the Fifth Amendment had been denied. The petition for rehearing did not allege a denial of a Seventh Amendment right to jury trial nor has petitioner ever raised that issue prior to this petition. The petition for rehearing was denied by the Court of Appeals on January 16, 1987.

REASONS FOR DENYING THE WRIT

I. The Writ Should Be Denied Because The Decision Below Rests Solely Upon The Interpretation Of State Law, And Does Not Raise Any Matter Of Substantial National Importance.

This Court has long declined to allow its certiorari jurisdiction to become an avenue of review for the myriad issues of state law which are decided by the United States courts of appeals in diversity cases. *E.g., Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (writ of certiorari dismissed as improvidently granted as to a judgment of a United States court of appeals which "primarily implicates questions of [a state's] law and presents no federal question of substance.") For the Court to hold otherwise would involve it in legal issues on which it could not speak with final authority, since the highest courts of the states are entrusted with the ultimate responsibility of interpreting the law of their respective jurisdictions. *Commissioner v. Bosch*, 387 U.S. 456, 464-65 (1967).

The petition now before the Court wholly fails to demonstrate that this case presents a significant federal question, despite the extreme lengths to which petitioner has gone in attempting to misportray what is in essence a routine issue of interpreting a state statute. Indeed, the petition states that the "most glaring mistake" of the Court of Appeals was in deciding that there was insufficient evidence in the record to apportion

damages between the settling defendants and National Gypsum. Petition at 5. This clearly does not constitute the showing of any "special and important" issue for review by this Court, as is required by Supreme Court Rule 17.

A bare recitation of the proceedings below makes clear that this case involves no more than a legal issue arising under the Tennessee Act. As set forth above, the District Court denied National Gypsum's motion to enforce its right to contribution solely on the basis that, as a matter of law, the Tennessee Act does not apply to punitive damages. The District Court held that apart from the fact that the Tennessee Act never requires contribution with respect to punitive damages, respondent would be entitled to contribution for such damages in this case. The Court of Appeals reversed because in its opinion the Tennessee Act was intended to allow contribution with respect to punitive damages. The Court of Appeals thus simply exercised its responsibility in a diversity case to interpret state law, and did not in any way depart from the "accepted and usual course of judicial proceedings" so as to justify an exercise of this Court's judicial discretion to hear this case. Sup. Ct. R. 17.1(a).

The decision below does not conflict with any decision by a Tennessee state court or by another federal court of appeals. *See infra* at 8-9. Moreover, the decision of the Court of Appeals will affect only a small number of parties and cases and does not present an issue of national importance which merits the attention of this Court. The Court of Appeals' opinion is of limited precedential value. It is not even finally binding in Tennessee, since the Supreme Court of Tennessee speaks with ultimate authority on issues relating to the interpretation of Tennessee law. In sum, there is no reason for this Court to commit its limited resources to this case.

II. The Court Of Appeals' Interpretation Of The Tennessee Act Does Not Violate The Seventh Amendment To The Constitution.

The petition suggests that this case involves an issue arising under the Seventh Amendment to the United States Constitution because the Court of Appeals impermissibly intruded upon the allocation of functions between judges and juries with respect to the issue of contribution between tortfeasors. This argument was not raised below in petitioner's request for rehearing before the Court of Appeals, and this Court should reject the argument on that basis alone, even apart from the fact that the argument is groundless. *E.g., Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

Petitioner's purported constitutional assault upon the Court of Appeals' interpretation of the Tennessee Act is also manifestly specious. As discussed above, the Court of Appeals reached its decision solely on an analysis of a legal issue arising under the Tennessee Act with respect to contribution of damages. The Court did not address the division of responsibilities between the judge and the jury in a manner which implicates Seventh Amendment concerns. Moreover, to hold that a constitutional issue is raised by a court's interpretation of state law on an issue such as the availability of contribution in tort cases would have absurd implications. For example, each time it is alleged that a federal court in a diversity case has erroneously granted a motion to dismiss the complaint for failure to state a claim — thus "depriving" a jury of the "right" to hear the case — or when a court is alleged to have erroneously granted summary judgment, a directed verdict or judgment n.o.v., the losing party could appear before this Court asserting that the court below had committed an error of constitutional proportions. The United States Constitution does not contemplate such a bizarre procedure.

III. The Court Of Appeals For The Sixth Circuit Did Not Violate The Due Process Clause.

Petitioner's suggestion that the Court of Appeals for the Sixth Circuit violated the Due Process Clause of the Constitution is also radically flawed.[5] In fact, this Court has expressly held that constitutional guarantees of due process do not "assure immunity from judicial error." *Stein v. State of New York*, 346 U.S. 156, 181 (1953); *Milwaukee Electric Railway & Light Co. v. State of Wisconsin*, 252 U.S. 100, 106 (1920) (Brandeis, J.). The suggestion that an error made by a federal court in interpreting state law somehow deprives a party of due process also makes light of the grave and important concerns which actually underlie the constitutional guarantee of due process. The Due Process Clause was intended to insure that a party would be afforded a fair hearing in connection with governmental action which deprives that party of "liberty" or "property." *See, e.g., Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). The Due Process Clause was not entitled to elevate a dispute over the interpretation of state law in a diversity case into an issue of constitutional significance worthy of this Court's attention.

IV. The Court Of Appeals Correctly Interpreted The Tennessee Act.

In light of the frivolousness of petitioner's suggestion that this case raises a significant issue of federal law, respondent need not dwell at length on the merits of the Court of Appeals' interpretation of the Tennessee Act.[6] It is sufficient to note that, as the Court of Appeals explained in its opinion, when the Ten-

5. This argument is supported solely by a reference to a passage from Corpus Juris Secundum, without any mention of support in any court decision.

6. In dealing with cases involving state law only, this Court has ruled that it will not normally overrule decisions by federal courts skilled in the law of a particular state. Rather, in cases where a state law issue was raised because it had a bearing on a federal issue otherwise properly before the Court. This Court has stated that it will defer to the lower courts unless they are clearly wrong or unreasonable. *Regents of University of Michigan v. Ewing*, —— U.S. ——, 106 S.Ct. 507, 513 n.10 (1986), *quoting Propper v. Clark*, 337 U.S. 472, 486-87 (1949); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

nessee legislature passed the Act, it expressly decided *not* to preclude a defendant from seeking contribution if that defendant had acted "willfully" or "wantonly" but not "intentionally." Petitioner here did not even allege that respondent had acted "intentionally," but rather relied on Tennessee's rule that punitive damages may be awarded if a defendant has acted "willfully."

The Act contains an express and simple requirement that an amount previously received in settlement from another tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release." The Act makes no distinction between compensatory damages and punitive damages. Moreover, contrary to the conclusion of the District Court, there is no suggestion whatsoever in the Tennessee Act that because one tortfeasor acts "separately" from other tortfeasors this extinguishes all rights to contribution.

Petitioner has cited no authority supporting her contention that Tennessee law does not permit contribution or reduction in judgment for punitive damages. The case on which she places primary reliance, *Huckeby v. Spangler*, 563 S.W.2d 555 (Tenn. 1978), does not even address the right of contribution. *Huckeby* holds only that punitive damages may be apportioned among defendants. Further, no other Tennessee case cited by petitioner addresses the issue of contribution.[7]

In sum, the Court of Appeals' interpretation of Tennessee law is correct. The Court's decision is certainly not so manifestly in error that this Court should grant a writ of certiorari, even assuming that such an issue of state law would otherwise warrant the attention of this Court.

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7. In a case which does discuss the issue of contribution, *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d. 337 (Tenn. 1976) (not cited in the petition), the Tennessee Supreme Court permitted a defendant to file a third-party complaint against joint tortfeasors from whom it sought contribution. In so doing, the *Velsicol* court stated that one who intentionally caused an injury had no right to contribution, but, significantly, the court did not state that the right of contribution was limited to compensatory damages only, even though the plaintiff in *Velsicol* had requested an award of punitive damages. *Id.* at 342-43 n.4. *Velsicol*, therefore, supports the Court of Appeals' decision that the Tennessee Act allows contribution for punitive damages. *See also Yett v. Smoky Mountain Aviation, Inc.*, 555 S.W.2d 867 (Tenn. Ct. App. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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